



July 11, 2014

*Sent Via Email And Certified Mail*

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**RE: NOTICE OF INTENT TO SUE**

Dear Secretary Vilsack, Secretary Jewell, et. al.:

## I. INTRODUCTION

In accordance with the 60-day notice requirement of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g), you are hereby notified that WildEarth Guardians (“Guardians”) intends to bring a civil action against the U.S. Forest Service and the officers and supervisors to whom this letter is directed (collectively the “Forest Service”) for violating Sections 7 and 9 of the ESA, 16 U.S.C. §§ 1536 and 1538, for failing to consult with the U.S. Fish and Wildlife Service (“FWS”) concerning the effects of its actions on the New Mexico meadow jumping mouse (*Zapus hudsonius luteus*), by failing to ensure that its actions are not likely to jeopardize the continued existence of the New Mexico meadow jumping mouse, and by illegally “taking” New Mexico meadow jumping mice. See 16 U.S.C. §§ 1536(a)(2), 1538(g). In particular, the Forest Service failed to initiate or reinstate consultation related to permitted livestock grazing in and around occupied New Mexico meadow jumping mouse habitat in the Santa Fe, Apache-Sitgreaves, and Lincoln National Forests (collectively “Forests”). See 16 U.S.C. § 1536(a)(2). There has thus far been no consultation considering the effects of ongoing grazing in the Forests on the New Mexico meadow jumping mouse. Due to these ongoing, unconsidered impacts, the Forest Service must initiate or reinstate formal consultation to protect this species immediately.

## II. LEGAL BACKGROUND

Section 2(c) of the ESA establishes that it is “the policy of Congress that all Federal . . . agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of” the ESA. 16 U.S.C. § 1531(c)(1). The purpose of the ESA is to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered and threatened species . . .” 16 U.S.C. § 1531(b).

To implement this policy, Section 7(a)(2) of the ESA requires that each federal agency consult with the FWS<sup>1</sup> to ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species. See 16 U.S.C. § 1536(a)(2). “Action” is broadly defined to mean “all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies” and includes “actions directly or indirectly causing modifications to the land, water, or air.” 50 C.F.R. § 402.02.

For federal actions, the federal agency must request a determination from the FWS of whether any listed or proposed species may be present in the area of the agency action. 16 U.S.C. § 1536(c)(1). If listed or proposed species may be present, the federal agency must

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<sup>1</sup> The New Mexico meadow jumping mouse is a species under FWS’s jurisdiction and was listed under the ESA subject to that jurisdiction. See, e.g., 79 Fed. Reg. 33,119 (June 10, 2014).

prepare a “biological assessment” to determine whether the listed species may be affected by the proposed action. See *id.*; 50 C.F.R. § 402.12. If the agency determines that its proposed action “may affect” any listed species, the agency must engage in “formal consultation” with the FWS. 50 C.F.R. § 402.14; see also 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (explaining that “may affect” broadly includes “[a]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character”).

After formal consultation, the FWS issues a biological opinion to explain whether the agency action is likely to “jeopardize” any species’ existence. 16 U.S.C. § 1536(a)(2). The biological opinion must include a summary of the information on which it is based and must adequately detail and assess how the proposed action affects listed species. 50 C.F.R. § 402.14(h). The biological opinion must also include an evaluation of the “cumulative effects on the listed species . . .” 50 C.F.R. § 402.14(g)(3). If the action is likely to cause jeopardy, then the biological opinion shall specify reasonable and prudent alternatives (“RPAs”) that avoid jeopardy. See 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. 402.14(h)(3). If the FWS concludes that the action or the RPAs will not cause jeopardy, it will issue an incidental take statement (“ITS”) that specifies “the impact, i.e., the amount or extent, of . . . incidental taking” that may occur. See 50 C.F.R. § 402.14(i)(1). The ESA requires agencies to use the best available science when conducting their analysis. See 16 U.S.C. § 1536(a)(2).

However, an agency’s consultation duties do not end with the issuance of a biological opinion. Instead, an agency must reinitiate consultation when: (1) the amount of take specified in the ITS is exceeded, (2) new information reveals that the action may have effects not previously considered, (3) the action is modified in a way not previously considered, or (4) “[i]f a new species is listed or critical habitat designated that may be affected by the identified action.” See 50 C.F.R. § 402.16.

After consultation is initiated (or reinitiated pursuant to one of the triggers set forth in the paragraph immediately preceding), ESA Section 7(d) prohibits the agency or any permittee from “mak[ing] any irreversible or irretrievable commitment of resources” toward a project that would “foreclos[e] the formulation or implementation of any reasonable and prudent alternative measures . . .” 16 U.S.C. § 1536(d). The 7(d) prohibition “is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied.” 50 C.F.R. § 402.09.

Additionally, Section 9 of the ESA prohibits the “take” of endangered species. 16 U.S.C. § 1538(a)(1)(B). “Take” means “to harass, harm, . . . wound, kill, trap, [or] capture” an endangered species. *Id.* § 1532(19).<sup>2</sup> It is also unlawful for any person to “cause [an ESA

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<sup>2</sup> The terms “harass” and “harm” are further defined in the ESA’s implementing regulations. “Harass” means “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or

violation] to be committed,” and thus the ESA prohibits a governmental agency from authorizing any activity resulting in take. See 16 U.S.C. § 1538(g); see also, e.g., Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997). Without a biological opinion and an ITS from the FWS covering the endangered species, an action agency is not authorized to “take” or jeopardize any members of that species.

### III. FACTS

#### A. Listing decision

On June 10, 2014, the FWS published a final decision listing the New Mexico meadow jumping mouse as an endangered species under the ESA (“listing decision”). See 79 Fed. Reg. 33,119.<sup>3</sup> The rule became effective on July 10, 2014. Id. The listing decision identified grazing as a primary source of previous habitat loss and local New Mexico meadow jumping mouse extirpations and stated that “ongoing grazing . . . will continue to put all of the remaining locations [where the New Mexico meadow jumping mouse occurs] at considerable risk of extirpation in the near-term (between now and the next 10 years) and increasing over the long term.” Id. at 33,122.

The listing decision notes that approximately 70 of the fewer than 100 New Mexico meadow jumping mouse populations that were found from the late 1980’s to the present have likely been extirpated. See id. at 33,121. Of the 29 New Mexico meadow jumping mouse populations where individual mice have been located rangewide since 2005, 19 of those areas occur in the Forests. See Species Status Assessment Report for the New Mexico Meadow jumping mouse (*Zapus hudsonius luteus*) (“SSAR”), FWS-R2-ES-2013-0023-0031 at 47, 51-59.<sup>4</sup> These areas are identified as:

1. San Antonio Creek, Santa Fe National Forest, Sandoval County;
2. Rio Cebolla at Lake Fork Canyon, Santa Fe National Forest, Sandoval County;
3. Lower Rio Cebolla, 0.9 kilometers (0.6 miles) southwest of Forest Road 376 bridge, Santa Fe National Forest, Sandoval County;
4. Rio Cebolla above junction with Rio de las Vacas, Santa Fe National Forest, Sandoval County;
5. Middle Silver Springs Creek, at Junction of Turkey Pen Canyon and Forest Road 405, Sacramento Mountains, Lincoln National Forest, Otero County;

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sheltering.” 50 C.F.R. § 17.3. “Harm” means “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3.

<sup>3</sup> <http://www.gpo.gov/fdsys/pkg/FR-2014-06-10/pdf/2014-13094.pdf>

<sup>4</sup> <http://www.regulations.gov/-!documentDetail;D=FWS-R2-ES-2013-0023-0031>

6. Cox Canyon and Rio Peñasco, Sacramento Mountains, Lincoln National Forest, Otero County;
7. Mauldin Spring, Wills Canyon, Sacramento Mountains, Lincoln National Forest, Otero County;
8. Agua Chiquita Creek, Sacramento Mountains, Lincoln National Forest, Otero County;
9. East Fork Little Colorado River, Apache-Sitgreaves National Forests, Apache County;
10. Nutrioso Creek, Apache-Sitgreaves National Forests, Apache County;
11. San Francisco River, upper, Apache-Sitgreaves National Forests, Greenlee County;
12. San Francisco River, Talwiwi Creek, lower, Apache-Sitgreaves National Forests, Greenlee County;
13. East Fork Black River, Apache-Sitgreaves National Forests, Apache County;
14. West Fork Black River, Middle, Apache-Sitgreaves National Forests, Apache County;
15. West Fork Black River, Lower, Apache-Sitgreaves National Forests, Apache County;
16. Boggy Creek, Apache-Sitgreaves National Forests, Apache County;
17. Centerfire Creek, Apache-Sitgreaves National Forests, Apache County;
18. Corduroy Creek, Apache-Sitgreaves National Forests, Greenlee County; and
19. Campbell Blue Creek, middle, Apache-Sitgreaves National Forests, Greenlee County.

See id. at 51-59. As a result of the listing decision, the Forest Service must initiate or re-initiate consultation regarding any federal action occurring in these areas to ensure that those actions do not jeopardize the New Mexico meadow jumping mouse, pursuant to the ESA.

#### B. Allotments That Overlap Occupied Habitat

In its memorandum used to assess the economic impacts of the proposed critical habitat designation for the New Mexico meadow jumping mouse, FWS identified 14 grazing allotments on the Forests that overlap with occupied New Mexico meadow jumping mouse habitat. See Consideration of Economic Impacts: Screening Analysis of the Likely Economic Impacts of Critical Habitat Designation for the New Mexico Meadow Jumping Mouse at 8-9.<sup>5</sup> These grazing allotments include:

Santa Fe National Forest:

1. Cebolla San Antonio; and
2. San Diego.

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<sup>5</sup> [http://www.fws.gov/southwest/es/NewMexico/documents/Draft\\_economic\\_impact\\_memo\\_jumping\\_mouse.pdf](http://www.fws.gov/southwest/es/NewMexico/documents/Draft_economic_impact_memo_jumping_mouse.pdf)

Lincoln National Forest:

1. Agua Chiquita Trail;
2. Bounds; and
3. Sacramento.

Apache-Sitgreaves National Forests:

1. Grandfather;
2. Nutrioso Summer;
3. PS;
4. Reservation;
5. South Escudilla;
6. Sprucedale/Reno;
7. Turkey Creek;
8. West Fork; and
9. Williams Valley.

Id. As FWS recognized in its listing decision, grazing in these allotments has caused past and present adverse effects to the New Mexico meadow jumping mouse, is causing an imminent threat of continuing adverse effects to the species, and is putting the meadow jumping mouse at “considerable risk of extirpation.” 79 Fed. Reg. 33,122.

C. Allotments Outside Occupied Habitat Jeopardize New Mexico Meadow Jumping Mouse

Grazing in allotments that are *not* coextensive with meadow jumping mouse sites and habitat also has caused extirpations of New Mexico meadow jumping mouse populations. The effects of grazing on allotments other than the 14 identified above continue to spill over into occupied New Mexico meadow jumping mouse sites. This occurs when trespass cattle stray beyond designated grazing allotments and gain access to and damage the New Mexico meadow jumping mouse’s extremely limited remaining habitat. See, e.g., SSAR at 51 (noting degraded condition and cattle sign at previous New Mexico meadow jumping mouse capture site in San Antonio Creek, Santa Fe National Forest); SSAR at 52 (noting that cattle had entered livestock enclosure at previous New Mexico meadow jumping mouse capture site and that “heavy grazing eliminated much of the herbaceous vegetation, leaving mostly bare, dry soils” at Rio Cebolla at Lake Fork Canyon in the Santa Fe National Forest); SSAR at 53 (noting that buck and poles fences were down around New Mexico meadow jumping mouse capture location in 2013, which would leave the Rio Cebolla above junction with Rio de las Vacas area in the Santa Fe National Forest open to trespass cattle use).

The threat of trespass cattle is especially severe for the New Mexico meadow jumping mouse because most of the populations in the Forests are limited to livestock enclosures, which have been breached by trespass cattle and essentially destroyed in at least one case. See, e.g., SSAR at 52, 54-58 (discussing sites where New Mexico meadow jumping mice had only been found in livestock enclosures, or where the livestock enclosures were the only

areas of habitat presently considered occupied, including Rio Cebolla at Lake Fork Canyon, Santa Fe National Forest (which was breached, heavily grazed, and left in an extremely damaged condition); Mauldin Spring, Wills Canyon, Sacramento Mountains, Lincoln National Forest; Agua Chiquita Creek, Sacramento Mountains, Lincoln National Forest; East Fork Little Colorado River, Apache-Sitgreaves National Forests; San Francisco River, upper, Apache-Sitgreaves National Forests; San Francisco River, Talwiwi Creek, lower, Apache-Sitgreaves National Forests; East Fork Black River, Apache-Sitgreaves National Forests; Boggy Creek, Apache-Sitgreaves National Forests; Centerfire Creek, Apache-Sitgreaves National Forests; Corduroy Creek, Apache-Sitgreaves National Forests). These trespass cattle thus have caused adverse impacts to the New Mexico meadow jumping mouse and its habitat and may jeopardize the continued existence of the species.

Even if trespassing cattle do not invade an area presently occupied by the New Mexico meadow jumping mouse, cattle presence at the periphery of the species' habitat is still likely jeopardizing the species. Cattle grazing destroys the habitat that the New Mexico meadow jumping mouse might otherwise expand or escape into and may also alter water availability required to keep existing habitat suitable. FWS stated that "[t]he New Mexico meadow jumping mouse has exceptionally specialized habitat requirements to support these life history needs and maintain adequate population sizes . . . This suitable habitat is only found when wetland vegetation achieves full growth potential associated with seasonally available or perennial flowing water." SSAR at 3. Grazing destroys this specialized habitat and renders it, at least temporarily, useless to the New Mexico meadow jumping mouse. Therefore, the species is relegated to small islands with, presently, little hope of range expansion and little ability to survive stochastic events. Additionally, should an enclosure be breached and grazed out of suitability, the population would almost certainly be extirpated as the mouse could only escape to similarly unsuitable habitat directly outside the enclosure. The species' inability to expand its present range in the face of nearly omnipresent grazing is especially problematic because all of the known populations are "insufficient (too small) to support resilient populations." SSAR at 5. Therefore, in addition to the 14 allotments that are in meadow jumping mouse occupied sites, other grazing in the Forests – that which occurs outside of occupied New Mexico meadow jumping mouse habitat but that could impair the species' ability to reasonably expand its range to become resilient, or that could damage the species' existing habitat – is also jeopardizing the species.

#### **IV. VIOLATIONS**

Because of the significant risk that grazing poses to the continued existence of the New Mexico meadow jumping mouse, the Forest Service must initiate and/or reinstate consultation with respect to any proposed or ongoing federal agency action with respect to grazing and grazing allotments that may impact the New Mexico meadow jumping mouse in the Santa Fe, Apache-Sitgreaves, and Lincoln National Forests. Unauthorized take is occurring and consultation is therefore required pursuant to Section 7 of the ESA and 50 C.F.R. § 402.16.

This would include consultation or re-initiation of consultation on:

1. Grazing associated with the 14 grazing allotments that are in the Forests and that overlap occupied New Mexico meadow jumping mouse habitat;
2. Grazing allotments that are in the Forests and that are adjacent to the 14 New Mexico meadow jumping mouse occupied grazing allotments to ensure that cattle do not trespass into those areas, reduce instream flows required for the species' habitat, or limit the New Mexico meadow jumping mouse's ability to expand its range to these areas; and
3. Grazing allotments located near the additional five areas of occupied New Mexico meadow jumping mouse habitat in the Forests to ensure that this cattle from those allotments do not trespass into those areas, reduce instream flows required for the species' habitat, or limit the New Mexico meadow jumping mouse's ability to expand its range in these areas.

The Forest Service is in violation of Section 7 of the ESA for failing to address grazing-related impacts and for failing to adequately assess the full extent to which its grazing authorizations are jeopardizing the New Mexico meadow jumping mouse's continued existence. The Forest Service is failing to ensure against jeopardy of this listed species. Unless and until the Forest Service takes such action and consults with the FWS on the livestock grazing activities occurring in the Forests that are discussed in this notice letter and ensures that such actions are not likely to jeopardize the continued existence of the New Mexico meadow jumping mouse, the Forest Service will remain in violation of the ESA. See 16 U.S.C. §§ 1536(a)(2), 1536(c)(1); 50 C.F.R. § 402.16. The Forest Service is also in violation of the ESA by allowing, authorizing, and approving actions, projects, and activities that may affect the New Mexico meadow jumping mouse prior to the completion of the required consultation with FWS. See 16 U.S.C. § 1536(a)(2). For these same reasons, the Forest Service is also violating Section 7(d) of the ESA. See 16 U.S.C. § 1536(d) (stating that after the initiation of consultation, the Forest Service shall not make any irreversible or irretrievable commitment of resources). Finally, the Forest Service's ongoing allowance of grazing operations that likely take the New Mexico meadow jumping mouse is violates of Section 9 of the ESA. See 16 U.S.C. § 1538(a)(1); 50 C.F.R. § 17.31. The Forest Service has no incidental take statement that covers ongoing activities in the Forests, which are taking this newly listed species, in violation of Section 9 of the ESA. 16 U.S.C. § 1538.

## **V. NOTICING PARTY**

WildEarth Guardians is a non-profit, public interest, environmental advocacy, and conservation organization. Guardians' mission is to protect and restore wildlife, wild rivers, and wild places in the American West. Guardians has over 44,000 members and activists, many of whom live, work, or recreate in areas affected by the ESA violations described herein. Guardians and its members have a substantial interest in the conservation and recovery of the New Mexico meadow jumping mouse and are adversely affected by the agency's failure to consult in order to ensure its action do not jeopardize or take the species.



The name, address and telephone number of the party giving this notice is as follows:

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## VI. CONCLUSION

For the above stated reasons, the Forest Service has violated and remains in ongoing violation of Section 7 and Section 9 of the ESA. If the aforementioned violations of the ESA are not remedied within 60 days of the date of this letter, we intend to file a citizen's suit in federal court seeking preliminary and permanent injunctive relief, declaratory relief, and legal fees and costs regarding these violations. Thank you for your attention. Please contact us should you have any questions regarding this matter.

Sincerely,



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